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**FILED**  
Clerk  
District Court

**JUN 23 2006**

For The Northern Mariana Islands  
By \_\_\_\_\_  
(Deputy Clerk)

6 Attorneys for the United States of America

7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN MARIANA ISLANDS

10 BERNARD SIKIMOUR PHILLIP,

CIVIL CASE NO. 05-0039

11 Plaintiff,

12 vs.

13 UNITED STATES OF AMERICA,  
14 UNITED STATES DEPARTMENT OF  
STATE,  
15 UNITED STATES IMMIGRATION AND  
CUSTOMS ENFORCEMENT and  
16 NANCY K. FINN, individually and in her  
official capacity,

**OPPOSITION TO ATTORNEY'S FEES**

17 Defendants.  
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20 The United States opposes the Attorney's Fee application as submitted by the Plaintiff's  
21 counsel and asserts that all of the necessary elements for an attorney's fee award under the Equal  
22 Access to Justice Act are absent in this case.

23 This case has its genesis in the application for a United States passport by an applicant  
24 who originated from the Federated States of Micronesia and applied for United States citizenship  
25 under specific provisions of the Covenant to Establish a Commonwealth of the Northern Mariana  
26 Islands in Political Union with the United States of America ("Covenant") at Section 301(b).  
27 State Department regulations require that all applicants for a U.S. Passport have the burden of  
28 proving United States nationality and providing evidence thereof. 22 C.F.R. Sec. 51.40, 51.41.

1 Additionally, the regulations authorize the State Department to require the applicant to provide  
2 other evidence deemed necessary to establish U.S. citizenship or nationality. 22 C.F.R. Sec.  
3 51.54. Prior to the filing of this litigation, the applicant failed to meet his burden of proof and  
4 refused to pursue the requested documentation. After a Complaint was filed the applicant's  
5 counsel, the attorney for the United States, and the District Court assisted by encouraging and  
6 helping the applicant to pursue and provide the documentation requested by the Passport  
7 Agency. His U.S. passport was promptly issued upon receipt of the required documentation.

8 The United States, in the hope of reaching an amicable resolution of this matter, proposed  
9 an Offer of Judgment at a sum of \$900.00 (Attached as Exhibit 1). Plaintiff's counsel's  
10 response was a filing for \$18,000.00 in attorney's fees, now amended to \$10,000.00. In fact, an  
11 award of attorney's fees is not appropriate under the circumstances of this case.

12 Under the "American rule," litigants ordinarily are required to bear the expenses of their  
13 litigation unless a statute provides otherwise. Carbonell v. Immigration and Naturalization  
14 Service, 429 F.3d 894, 897-8 (9<sup>th</sup> Cir. 2005). The Equal Access to Justice Act (EAJA), 28 U.S.C.  
15 § 2412, authorizes an award, to a prevailing party, of reasonable attorney's fees against the  
16 Government "unless the court finds that the position of the United States was substantially  
17 justified." Pierce v. Underwood, 487 U.S. 552, 552-3 108 S.Ct. 2541 (1988).

18 The EAJA states that a litigant is entitled to attorney's fees and costs if: (1) he is the  
19 prevailing party; (2) the government fails to show that its position was substantially justified or  
20 that special circumstances make an award unjust; and (3) the requested fees and costs are  
21 reasonable. Carbonell, 429 F.3d at 898; citing Perez-Arellano v. Smith, 279 F.3d 791, 793 (9<sup>th</sup>  
22 Cir. 2002); 28 U.S.C. § 2412(d)(1)(A)(2005). The attorney's fees request submitted in this case  
23 fails on all three requirements!

24 Plaintiff was not the "prevailing party". To qualify as a prevailing party he must meet  
25 two criteria. Buckhannon Bd. & Care Home, Inc v. West Virginia Dep't of Health & Human  
26 Res., 532 U.S. 598, 121 S.Ct. 1835 (2001). First, he must achieve a "material alteration of the  
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1 legal relationship of the parties.” Second, that alteration must be “judicially sanctioned.” Id. 532  
2 U.S. at 604-05; Carbonell, 429 F.3d at 898.

3 In the case of this applicant, the Passport Agency required that the applicant submit  
4 specified documentation. Ultimately, the applicant did submit the required documentation. It is  
5 apparent from the Declaration of Jane Mack and the Amended Declaration of George L.  
6 Hasselback (both Declarations filed on June 9, 2006) that the attorney would challenge the  
7 Passport Agency’s requirement of documentation. Mr. Hasselback states that “proving a  
8 negative proved to be quite time and labor intensive.” Hasselback at 2. Jane Mack cites to a case  
9 where information was submitted that “was not specific to the two individuals” in the case.  
10 Mack at 3. These statements indicate that the attorneys view the requests for documentation as  
11 something they should challenge rather than assist the applicant to fulfill. They are hostile to the  
12 requirements and see no need to document those gaps where a birth certificate or other  
13 information might be absent. In contrast, the Declaration of Nancy K. Finn (Attached as Exhibit  
14 2) states that the Passport Agency requires documentation from public records, “unless the  
15 applicant duly establishes that such information is not available.” Finn at ¶ 9.

16 An example of Plaintiff’s failure to comply with an appropriate request of the Passport  
17 Agency was when the applicant was asked to produce a statement from the Clerk of Court of  
18 Chuuk confirming the lack of records for his birth. The applicant apparently made no effort to  
19 obtain the requested documentation. Instead, he only submitted a copy of a letter apparently  
20 requested by, and sent to an unrelated individual. Finn at ¶ 11. It was not explained how he  
21 obtained the letter or why he thought it would be appropriate to submit it in lieu of information  
22 specific to himself. Subsequent to the filing of the Complaint in this case, the U.S. District Court  
23 assisted the Plaintiff with calling the Clerk of Court of Chuuk who then conveyed the letter  
24 required by the Passport Agency. Other applicants have obtained similar letters about their  
25 records (either that the record for their birth was available, or was not) by requesting a letter from  
26 the Clerk. There was no legitimate reason for Plaintiff’s refusal to pursue this

1 documentation duly requested by the Passport Agency.

2       The necessity for the Agency to collect the proper documentation, specific to the  
3 applicant, is axiomatic. It is also required by State Department regulations and consistent with  
4 recent amendments to United States laws, such as the Real ID Act of 2005 (Pub.L. 109-13, 119  
5 Stat. 231)(May 11, 2005), that focus substantial United States government resources on ensuring  
6 the integrity of government issued documents. The meticulous and verifiable documentation  
7 required for the issuance of a U.S. Passport is fundamental to maintaining it's integrity and  
8 security. The U.S. passport is one of the most reliable documents in the world. Not only do the  
9 required documents protect the security and integrity of the United States, the documents can be  
10 essential to the applicant and to any "derivative" applications that are subsequently filed by his  
11 family members. The documents can remain relevant several generations later. It can even be a  
12 matter of concern for United States national security.

13       Another example of the problems with the applicant's documentation that Plaintiff had  
14 yet to resolve was the submission of two separate voter registration documents that directly  
15 contradicted each other and had an essential bearing upon whether applicant's application was  
16 considered pursuant to section 301(b) or 301 c) of the Covenant. Both documents had the  
17 signature of the same Administrative Officer! The submission of official documents that are  
18 contradictory as to dates is a red flag for any government agency. The applicant's submissions  
19 were reviewed by the Passport Agency and given individual attention. The applicant was simply  
20 asked to clarify the contradiction. Rather than resisting such efforts the applicant, and any  
21 professionals assisting him, should have risen to the problem and corrected or explained it. The  
22 Passport Agency cannot, did not, and should not shrug off these red flags.

23       At no point did applicant "prevail" in having the Passport Agency compromise its  
24 requirements for specific, reliable documentation. Applicant is not a "prevailing party" under the  
25 EAJA.

26       Even if the applicant were to be interpreted as a "prevailing party", he would have to  
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1 show that the alteration of his “legal relationship” with the Passport Agency was “judicially  
2 sanctioned.” Buckhannon, at 604-05; Carbonell, at 898; 28 U.S.C. § 2412(d)(1)(A). The Court  
3 did not and would not order that the Passport Agency reduce the requirements for documentation  
4 from passport applicants.

5 Further, there can be no award of attorney’s fees where the court finds that the position of  
6 the United States was “substantially justified.” 28 U.S.C. 2412(d)(1)(A). The phrase  
7 “substantially justified” means justified in the main, justified to a degree that could satisfy a  
8 reasonable person. Pierce, at 553.

9 The Passport Agency’s requirement for documentation in this case was inherently  
10 reasonable. The Declaration from the Regional Director reflects that the Plaintiff’s application  
11 was handled by senior passport specialists and personally reviewed by the Director. Finn at ¶ 7  
12 & 8. Custom letters were crafted to give the applicant personalized and relevant guidance  
13 consistent with the Passport Agency’s approach to all applicants who apply under § 301 of the  
14 Covenant. Requiring reliable documentation of the facts necessary to the issuance of a U.S.  
15 Passport is substantially justified. Requiring an applicant to establish that such information is not  
16 available, when it is not, is also essential to the integrity of the U.S. passport.

17 Finally, the EAJA requires that the attorney’s fees be “reasonable”. The attorney in this  
18 case accepted a referral from the Micronesian Legal Services. Predictably, his pro-bono client  
19 had many needs that extended beyond assistance with fulfilling the documentation requested by  
20 the Passport Agency. Though his latest declaration states that he has attempted to discount the  
21 efforts he made regarding airlines and other persons to help his client with travel plans and health  
22 issues, there is still a bulk of such social services reflected in his billing records. The EAJA  
23 allows for attorney’s fees to a prevailing party, in “any civil action ... including proceedings for  
24 judicial review of agency action.” 28 U.S.C. § 2412(d)(1)(A). No doubt the attorney’s pro-bono  
25 client was in need of assistance with travel and with his health, and also in need of discussion,  
26 but these are inappropriate billings under the EAJA.

1 The EAJA provides one final provision for the Court to deny attorney fee's in this case.  
2 The EAJA states that a Court may not make an award to a party if it "finds... that special  
3 circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). This provision "gives the  
4 court discretion to deny awards where equitable considerations dictate an award should not be  
5 made." Oguachuba v INS, 706 F.2d 93, 98 (2d. Cir. 1983). Courts have applied it where the  
6 party opposed to the United States shared some blame for the problem that lead to the litigation.  
7 It has been applied where the party willfully avoided the INS (Oguachuba, at 94), where the party  
8 contributed to "an inadequately developed administrative record" (Ortiz v. Chater, 1997 WL  
9 50217 (E.D.N.Y.)), and where the attorney lacked "specificity in his initial itemization of hours  
10 expended" (Chesser v. West, 11 Vet.App. 497 (USCVA 1998)).

11 The equitable circumstances that concern the United States in this case are manifested in  
12 the declarations submitted in support of the Attorney's Fees. The Declaration of Jane Mack  
13 states that she believes that the applicant's use of his Federated States of Micronesia (FSM)  
14 passport would be construed as "an admission against his interest". Mack at 2. She states that  
15 she believes that the Passport Agency "failed to mislead Mr. Phillip into giving up his  
16 entitlement to a U.S. Passport... ." Id.

17 Contrary to Ms. Mack's representation, the use of an FSM passport would not have  
18 negatively affected Mr. Phillip's eligibility for a U.S. passport. The possession and use of the  
19 applicant's FSM passport has no legal effect on his eligibility for United States citizenship.<sup>1</sup> The  
20 right to a U.S. passport is controlled by the United States Constitution, United States laws and  
21 State Department regulations -none of which allude in any manner to other passports held by an  
22 applicant.

23 Based on the unfortunate presumption of Ms. Mack that the Passport Agency was trying  
24 "mislead" the applicant, he was unable to travel to Guam where his family could have cared for

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26 <sup>1</sup> It may be that Ms. Mack confuses these applications with the special circumstances of a  
27 distinctly different group of applicants who claimed necessity for a U.S. passport based on their being  
28 "Stateless".

1 him during the illness described in the Declaration of Hasselback and reflected in the attorney's  
2 billings.

3 Ms. Mack also states that, "Ms. Finn of the U.S. Passport Agency is aware of that (sic)  
4 records from Chuuk islanders born before World War II are not generally available from previous  
5 applications and litigation." She misses the necessity that the applicant make affirmative  
6 assertions and provide proof that applies specifically to his application. She also glosses over the  
7 important fact that many records have been located in individual cases and that those records  
8 further the knowledge and insight the Agency needs to best serve the entire region.

9 The mistaken belief that the Agency is attempting to be insincere in requesting  
10 documentation is dangerous and tragic not just because it leads to incorrect legal advice, it is also  
11 likely to lead applicants to refrain from collecting and submitting the necessary documents to  
12 gain approval for a U.S. Passport. An award of \$ 10,000.00 in this case, where the applicant  
13 simply did not, or would not, provide the requested documentation, will serve to further fuel  
14 more such incorrect advice, with further delays and hardships for applicants. The requested  
15 award would be unjust and damaging under these circumstances.

16 The Application for Attorney Fees should be denied. Plaintiff is not the "prevailing  
17 party", the Government's position was substantially justified and the amounts listed are not  
18 reasonable. An award of attorney's fees would be unjustified under the EAJA and "unjust" in  
19 these circumstances.

20 So submitted this 23d day of June, 2006.

21  
22 LEONARDO M. RAPADAS  
23 United States Attorney  
24 Districts of Guam and the NMI

25 By: \_\_\_\_\_

26 MIKEL W. SCHWAB  
27 Assistant U.S. Attorney  
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